Supreme Court, U.S.
JUN 10 2002
CLERK

No. 01-1635

In The
Supreme Court of the United States

BLANCHE GREENLESS,

Petitioner,

v.

LINCOLN C. ALMOND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pg

QUESTION PRESENTED

Rhode Island, along with the other states, pursued direct claims in civil actions in the various state courts against tobacco manufacturers as part of a nationwide effort for the vast harm caused to the states themselves. Rhode Island, the tobacco manufacturers, and forty-six other states settled that lawsuit and executed a contractually binding Master Settlement Agreement ("MSA") in November of 1998. Rhode Island agreed to receive its monetary settlement in the future along with a wide variety of relief. Congress, in reaction to the historic settlement, enacted 42 U.S.C. § 1396b(d)(3)(B) and exempted the states' settlement with the tobacco manufacturers from federal Medicaid recoupment provisions. Thus, the question presented is whether the First Circuit in the case of *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002) properly determined the plain language of 42 U.S.C. § 1396b(d)(3)(B)(ii) entitled the State of Rhode Island to utilize its recovery "for any expenditures deemed appropriate by the State." *Id.*

PARTIES

Jane Hayward succeeded Christine L. Ferguson as the Director of the Department of Human Services for the State of Rhode Island. Hayward is therefore automatically substituted as a party pursuant to Supreme Court Rule 35(3). Respondents are now Lincoln C. Almond, in his official capacity as Governor for the State of Rhode Island, Jane Hayward, in her official capacity as Director of the Department of Human Services for the State of Rhode Island, and Sheldon Whitehouse, in his capacity as Attorney General for the State of Rhode Island. (Collectively "the State").

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STATEMENT OF THE CASE

A. Rhode Island's Tobacco Suit

This claim arises out of the significant lawsuit between the tobacco manufacturers and the states. Rhode Island pursued a recovery for both past and future damages, and for the direct medical expenditures incurred only by the state itself. No other party or individual was a plaintiff in that action except the State of Rhode Island. Rhode Island was the only Plaintiff to its suit against the tobacco manufacturers on direct statutory and common law claims. The State's Amended Complaint did not contain a segregation claim on behalf of any individual or any single Medicaid recipient, but rather was based on the harm to the general public.

B. The Master Settlement Agreement

The MSA is a comprehensive global settlement of all the states' claims against the tobacco manufacturers. *See Greenless*, 277 F.3d at 603, *citing* National Association of Attorneys General, *Master Settlement Agreement* at http://www.naag.org/tobac/cgimsa.rtf (Nov. 23, 1998). Attorney General Jeffrey B. Pine executed Rhode Island's MSA on November 23, 1998. The MSA identifies the releasing parties as the State of Rhode Island and the tobacco manufacturers. *See* MSA §§ II (pp.) at 12, and (qq.) at 12.[1] Under the MSA, the claims of any "private or

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[1] The MSA § II (pp.) at 12, states "The Releasing Parties includes the State and its agents and officers, its political subdivisions and "(2) persons or entities acting in parents patraie, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity, whether or not any of them participate in the settlement, (A) to the extent any person or entity is seeking relief on behalf of or

(Continued on following page)

individual" for any "relief for separate and distinct injuries" was specifically left open. MSA (pp.) at 12. In addition, the tobacco manufacturers did not admit or concede any liability or wrongdoing whatsoever in the MSA. The State of Rhode Island, through its MSA, is the only intended beneficiary of its settlement with the tobacco manufacturers.

C. The Congressional Response

Subsequent to the execution of the MSA legislation was introduced and passed by Congress that recognized the states' recovery was not subject to the Federal Medicaid recoupment provisions. Congress enacted 42 U.S.C. § 1396b(d)(3)(B) which provides:

> (i) Subparagraph (A) and paragraph (2)(B) [referring to the Medicaid recovery provisions of 42 U.S.C. § 1396a(a)(25)] shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26 [26 U.S.C.A. § 5702(d)], and State Attorneys General, or as party of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.
>
> (ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual

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generally applicable to the general public in such Settling State or the people of the State, ***as opposed solely to private or individual relief for separate and distinct injuries."*** (emphasis added)

> settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

This amendment became effective on May 21, 1999.

D. Petitioner's Complaint

Petitioner claims that since the state recovered state tax dollars expended on the Medicaid program from the tobacco manufacturers that the tobacco suit was therefore a "recovery action compelled by the Medicaid Act under 25 U.S.C. § 1396a(a)(25)." Petitioner contended that the failure by the State to disperse any alleged excess to her from the tobacco settlement pursuant to 42 U.S.C. § 1396k(b) that the state has violated her property rights under Federal law and the Fifth and Fourteenth Amendments to the United States Constitution.

E. The First Circuit Decision

The First Circuit properly addressed the issue under the language of 42 U.S.C. § 1396b(d)(3)(B)(i) that removed any possible claim to the money under federal law by the individuals whose illness caused the states to spend "their tax dollars." *Greenless,* 277 F.3d at 605. The First Circuit found that "[e]very court to consider the question has, however, decided that § 1396k(b) does not apply to the state tobacco settlements, either because the settlements are not recoveries of the sort governed by that section as a general matter or because § 1396b(d)(3)(B)(ii) specifically exempts the settlement." *See Greenless,* 277 F.3d at 606 (citations listing decision and basis omitted). The First Circuit reasoned that when Congress determined the states could use their settlements for "'any expenditures

deemed appropriate by the State cannot simultaneously be owed to Medicaid recipients.'" *Greenless*, 277 F.3d at 608, *citing Tyler v. Douglas*, 280 F.3d 116, 122 (2nd Cir. 2001) (*quoting* 42 U.S.C. § 1396b(d)(3)(B)(ii)).

SUMMARY OF ARGUMENT

There is no reason, compelling or otherwise, for this Court to grant Petitioner's Writ of Certiorari. This Petition presents a simple matter of statutory construction and the plain language of 42 U.S.C. § 1396b(d)(3)(B). *Greenless*, 277 F.3d 608-609. The Circuit Courts of Appeal that have considered this matter have denied the appeals.[2] The statute at issue here deals with a one-time settlement of the states' claims against the tobacco manufacturers. Those lawsuits were based on the states' direct claims against tobacco. Congress recognized the tobacco suit as such a direct action, and amended the Medicaid statute to exempt the states' settlement from it. Moreover, Petitioner cannot maintain her claim under § 1396k(b) since it does not apply. Further review of this case is unnecessary.

[2] *See Harris v. Owens*, 264 F.3d 1282, 1294-97 (10th Cir. 2001) (relying on § 1396b(d)(3)(B)(ii)); *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001) (relying on § 1396b(d)(3)(B)(ii)); *McClendon v. Georgia Department of Community Health*, 261 F.3d 1252, 1259-62 (11th Cir. 2001) (relying on 1396K(b)); *Strawser v. Lawton*, 126 F. Supp.2d 994, 1003 n.6 (S.D. W.V. 2001), *appeal docketed*, No. 01-1175 (4th Cir. Feb. 9, 2001) (relying on § 1396b(d)(3)(B)(ii)). *Floyd v. Thompson*, 277 F.3d 1029, 1035-38 (7th Cir. 2000) (relying on 1396k(b) and Wisconsin assignment law).

ARGUMENT

1. There Is No Compelling Reason To Grant Review Of This Case

The issue presented here, as Petitioner concedes, is a matter of statutory interpretation of one specific statute that deals with the settlement of one lawsuit by the states against the tobacco manufacturers. It does not implicate the entire Medicaid statute. Petitioner is seeking further clarification of a decision that has already been properly answered several times. Indeed, these other courts have also determined that the plain statutory language of 42 U.S.C. § 1396b(d)(3)(B)(ii) forecloses Petitioner's claims.[3] Accordingly, there is no overriding issue of federal concern worthy of this Court's attention.

Although other federal circuits have denied Petitioner's claim on different grounds, none of them have found that Petitioner somehow has a property interest in the states' tobacco settlement. There is no split of the circuit courts as to the result. The First Circuit also doubted Petitioner's claim since it was "not clear whether any of the money recovered by Rhode Island is money to which Greenless and her class can stake a claim under § 1396k(b) as it stood at the time of the settlements." *Greenless*, 277 F.3d at 608, *citing McClendon*, 261 F.3d at 1259-62.

In addition, Rhode Island maintains that Petitioner could not satisfy the requirements of 42 U.S.C. § 1396k(b). First, the tobacco suit was not a subrogation claim or

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[3] *Harris v. Owens*, 264 F.3d 1282, 1294-97 (10th Cir. 2001) (relying on § 1396b(d)(3)(B)(ii)); *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001) (relying on § 1396b(d)(3)(B)(ii)); *Strawser* (relying on § 1396 b(d)(3)(B)(ii)).

based on an assignment. Second, there has been no finding of liability for the Petitioner by tobacco as required by 42 U.S.C. § 1396a(a)(25)(B) to engage the Medicaid recoupment provisions. Third, Petitioner does not have the required order under § 1396k to permit a recovery against the state. *See Calif. v. Superior Court*, 99 Cal. Rptr. 2d 735, 741 n.9 (Cal. Ct. App. 2000). The statute, § 1396k, applies where "Medicaid expenses are incurred for a minor Medicaid beneficiary. . . . It provides for reimbursement of any 'excess' to the beneficiary because it addresses a situation where the non-custodial parent might be ordered to pay for more than the child's medical expenses." *Id.*, *citing Perry v. Dowling*, 95 F.3d 231, 237-38 (2nd Cir. 1996) (construing § 1396k in its entirety). The State of Rhode Island was the only Plaintiff to the State's tobacco settlement. There were no individual's rights affected by the judgment or the MSA. Thus, Petitioner is unable to maintain any claim to any states' portion of the tobacco settlement.[4]

[4] The State also maintains that the Eleventh Amendment to the United States Constitution bars any recovery here as well. The First Circuit avoided this constitutional issue by disposing of the case on Constitutional grounds.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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